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NO. 80-2167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANNELIESE B. LAMB, individually and on behalf of all other persons similarly situated,

Petitioner,

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. If a Social Security recipient receives her full Social Security benefits each month, does she "assign" or "transfer" those benefits in violation of §207 of the Social Security Act if those benefits are offset against private disability payments received under a private disability insurance contract?

2. If a Social Security recipient receives Social Security benefits for her dependents each month, is the Social Security Act violated if those Social Security benefits are offset against private disability payments received under a private disability insurance contract?

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, which is reproduced at Appendix 1a to the Petition for a Writ of Certiorari, is reported at 643 F.2d 108 (3d Cir. 1981).

The opinion of the United States District Court for the District of New Jersey granting summary judgment

on the amended Complaint, which is reproduced at Appendix 11a to the Petition for a Writ of Certiorari, is reported at 509 F.Supp. 560 (D.N.J. 1980).

The transcript of the unreported oral opinion of the United States District Court for the District of New Jersey granting summary judgment on the initial Complaint is reproduced at Appendix 51a to the Petition for a Writ of Certiorari.

Statement of the Case

(a) *Introduction.* Petitioner is insured by a private insurance contract between petitioner's former employer and respondent. That contract provides for certain monthly income benefits for disabled employees. The contract also provides that these monthly income benefits are reduced by "any periodic cash payments provided on account of Employee's disability: * * * (b) by the Federal Social Security Act, including benefits payable to the Employee's dependents on account of the Employee's disability." Pursuant to this provision, monthly payments under the contract are reduced when the employee's Social Security monthly payments are increased. Conversely, when the employee's Social Security monthly payments are decreased, the contract provides that the employee's payments under the contract are increased.[1]

[1] Throughout the Petition there are references only to increases in petitioner's Social Security benefits. However, as noted by the District Court, as petitioner's dependent children reach the age of majority, petitioner's payments from Social Security are decreased and, pursuant to the unfrozen offset, her payments from respondent are increased (509 F.Supp. at 562; Appendix 15a to Petition). Indeed, there have been instances during the pendency of this litigation that petitioner's payments from Social Security have been decreased and her payments from respondent have increased (509 F.Supp. at 562 (footnote 6); Appendix 15a to Petition (footnote 6)).

Such a contractual provision is known as an "unfrozen" offset. An alternative and distinct type of disability contract contains a "frozen" Social Security offset, that is, an unchanging offset keyed to the employee's Social Security benefits at the time the payments under the contract commence.

Petitioner is a disabled employee who has received monthly benefits under the contract since January 1971. In addition, since that time petitioner has received Social Security benefits. In accordance with the terms of the contract, petitioner's payments under the contract have been reduced by the entire amount of Social Security payments she has received each month, including Social Security payments made to petitioner for her dependents. Although petitioner has received all of her Social Security benefits, and has not transferred or assigned them to respondent, she alleges that the unfrozen offset constitutes an assignment of her Social Security benefits, and she seeks to invalidate the provision of the contract mandating the unfrozen Social Security offset.

(b) *The proceedings below.* On June 29, 1977, petitioner filed her Complaint in the United States District Court for the District of New Jersey. Petitioner alleged that the unfrozen Social Security offset was an assignment of her Social Security benefits in violation of Section 207 of the Social Security Act. On July 31, 1978 the District Court granted respondent's motion for summary judgment, and dismissed plaintiff's complaint with prejudice. However, the District Court also granted petitioner leave to file an amended Complaint.

On September 13, 1978 petitioner filed an amended Complaint. In her amended Complaint petitioner alleged once again that the unfrozen Social Security offset violated Section 207 of the Social Security Act. In addition, she

also alleged that the offset of Social Security benefits received by petitioner on behalf of her dependents violated Section 202(d)(2) of the Social Security Act.[2] Respondent thereafter moved for summary judgment, and petitioner cross-moved for partial summary judgment on that count of her amended Complaint alleging that the unfrozen Social Security offset violated the Social Security Act. On March 3, 1980, the District Court granted respondent's motion for summary judgment, dismissed with prejudice all of petitioner's federally based claims, and denied petitioner's cross-motion for partial summary judgment (509 F.Supp. 560; Appendix 11a to Petition).[3]

The judgment of the District Court was affirmed by the United States Court of Appeals for the Third Circuit on February 23, 1981 (643 F.2d 108; Appendix 1a to Petition). Judge Arlin Adams, in rendering the unanimous opinion of the Third Circuit, agreed with the District Court that petitioner had not transferred or assigned her Social Security benefits to respondent, and held that the anti-assignment provision of the Social Security Act was inapplicable to the unfrozen offset:

> "Here, the fact is that Lamb receives her full entitlement from the Social Security program. She has not transferred any portion of her federal benefits to the insurance company. Since §407 does not address itself to the level of benefits that a private insurance program must pay to augment federal

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[2]Petitioner also asserted various pendent state law claims in her amended Complaint.

[3] Upon granting respondent's motion for summary judgment on the federal claims, the District Court dismissed petitioner's pendent state law claims for lack of jurisdiction.

programs, we cannot say that [respondent's] insurance contract runs afoul of the anti-transfer provision of the Social Security Act." (643 F.2d at 111, Appendix 7a to Petition).

(c) *The material facts.* In 1969 petitioner was employed by Overlook Hospital (509 F.Supp. at 561; Appendix 12a to Petition). In October 1969, after negotiating with respondent over various types of coverages, terms and benefits (509 F.Supp. at 561 (footnote 2); Appendix 12a to Petition (footnote 2)) Overlook and respondent entered into a group long-term disability contract of insurance (643 F.2d at 209; Appendix 2a to Petition). The contract entitled covered employees to a monthly income benefit equalling 70% of their monthly basic earnings (643 F.2d at 209; Appendix 2a to Petition).

The contract also provided that the monthly income benefit payable under the contract would be offset by the amount of Social Security benefits received by a disabled employee (643 F.2d at 108; Appendix 2a to Petition). This contractual Social Secuirty offset was "unfrozen." Rather than being fixed at the time an employee became eligible for benefits under the policy, the offset increased or decreased as the amount of Social Security benefits payable to the disabled employee increased or decreased.[4] Despite the unfrozen nature of the offset, the policy provided that a minimum benefit of $50 per month would be paid, irre-

[4] The risk in entering into a contract with an unfrozen Social Security offset is clearly a two-sided risk affecting both petitioner and respondent. Aside from the decreases in petitioner's Social Security benefits that have taken place as petitioner's dependents reach the age of majority (see footnote 1 at p. 2 *supra*), it is well settled that Social Security benefits are not contractual and can be reduced by the Congress. 42 U.S.C. §1304 (1976); *see, Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 575 (1979).

spective of the level of the Social Security offset (509 F. Supp. at 561-62; Appendix 13a-14a to Petition). By virtue of entering into a contract with an unfrozen Social Security offset, the premiums were "significantly" lower than they would have been had a policy with a frozen Social Security offset been purchased.[5]

Shortly after petitioner enrolled in the plan, she became disabled (643 F.2d at 108; Appendix 3 to Petition). Thereafter, in January 1971 she became eligible for benefits under the private insurance contract (643 F.2d at 108; Appendix 3a to Petition). In addition, she also became eligible for Social Security benefits for her and her dependents (643 F.2d at 108; Appendix 3a to Petition). In accordance with the terms of the contract, the payments made each month to petitioner by respondent were offset by the entire amount of Social Security payments made to petitioner, including payments to petitioner for her dependents (509 F.Supp. at 562; Appendix 15a to Petition).

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[5] Petitioner's suggestion that respondent did not consider the nature of the Social Security offset in fixing the premium is wholly unsupported by the record. Indeed, as noted by the Third Circuit, the record clearly indicates that respondent did consider the nature of the Social Security offset in fixing the premium:

> "The employer could have selected another plan that did not offset Social Security benefits in this fashion. Because [respondent] considered 'Other Income Benefits' in its actuarial calculations, however, the premium under this other option would have been significantly higher." (643 F.2d at 109 (footnote 1); Appendix 3a to Petition (footnote 1)).

In any event, any dispute as to whether or not respondent considered the "unfrozen" nature of the offset in fixing premiums is not material to the legality *vel non* of the unfrozen Social Security offset.

Reasons for Denying the Writ

This case presents no important questions of Federal law. Each month petitioner receives her full Social Security benefits. At no time are her Social Security benefits transferred or assigned to respondent or to any other person. Hence, the issue that petitioner purports to present to this Court—the transfer or assignment of Social Security benefits—does not exist.

Nor does this case present any important questions of public policy or Congressional intent. On this subject, the Petition is misleading. Although not referred to in the Petition, the *relevant* legislative history clearly reflects that Congress did not intend to prohibit unfrozen Social Security offsets in private disability contracts, and in fact hoped that Social Security offsets would exist.

In addition, it is apparent that Congress is clearly aware of the distinction between frozen and unfrozen Social Security offsets. It has expressly prohibited the use of unfrozen Social Security offsets in other areas, such as in ERISA approved pension plans. Congress has not prohibited them in employee welfare plans such as the plan at issue in this case. Indeed, in 1978 a bill was introduced in Congress that would prohibit the use of unfrozen Social Security offsets in employee welfare plans. If enacted, that bill would have prohibited unfrozen Social Security offsets of the type at issue in this case. However, Congress never enacted that bill or any other statute that would prohibit unfrozen Social Security offsets in disability contracts.[6]

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[6] Although the Petition has generalized, unsupported references to Congressional intent, it does not even call the Court's attention

(Footnote continued on following page)

The judgment below is consistent with the prior precedents of this Court. The cases that the Petition suggest conflict with the judgment below are readily distinguishable from this case. Moreover, this Court, in a unanimous opinion rendered in *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S.Ct. 1895 (1981), only three months ago, analyzed highly analogous issues. The judgment below is entirely consistent with the Court's opinion in *Alessi*. Insofar as this Court, within the last three months, has analyzed issues analogous to those raised by the petitioner in this case, the issues in this case cannot be said to be so novel as to warrant granting the Petition.

Finally, merely because there are numerous Social Security claims and recipients does not justify granting the Petition. In any case in which the plaintiff challenges the legality of an insurance contract there will be many persons who will be affected. This alone, however, would not supply an independent basis for this Court to exercise its jurisdiction in the absence of issues of public importance, which are not present in this case. Moreover, as noted by the District Court, in this case all persons in a payee status under respondent's policies do not appear to be similarly situated (509 F.Supp. at 568 (footnote 8); Appendix 28a to Petition (footnote 8)).

(Footnote continued from preceding page)

to the prior precedents, such as *Hurd* v. *Illinois Bell Telephone Co.*, 136 F. Supp. 125 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956), *cert.* denied *sub nom.* Seybold v. Western Electric Co., 352 U.S. 918 (1956), that have analyzed the Congressional history in enacting the anti-assignment provision of the Social Security Act or the bill that would have prohibited the use of unfrozen Social Security offsets in employee welfare plans.

The issue that petitioner purports to present to this Court—the transfer or assignment of Social Security benefits—is not present in this action. There are no important issues of Congressional intent or public policy raised by this case. This Court has recently analyzed statutes similar to the statute petitioner invokes in this action. This case is not a case of public importance, and the Petition should be denied.

(a) *The unfrozen offset simply is not a transfer or assignment, and does not raise any questions under the Social Security Act.* The Social Security Act prohibits the transfer or assignment of Social Security benefits:

> "The right of any person to any future social security payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. §407 (1976).

This provision in effect creates a statutory spendthrift trust. Its purpose is to protect Social Security recipients from the claims of creditors so that they will be able to support themselves and their dependents, and will not become public charges. *Brown* v. *Brown*, 32 Ohio App.2d 139, 288 N.E.2d 852 (Ohio Ct. App. 1972); *French* v. *Director, Michigan Department of Social Services*, 92 Mich. App. 701, 285 N.W.2d 427 (Mich. Ct. App. 1979).

In this case, petitioner each month receives her full entitlement from the Social Security program, and she has neither transferred nor assigned her Social Security payments. Hence, there is no transfer or assignment of peti-

titioner's Social Security benefits, and the anti-assignment provision of the Act is not applicable.[7]

As noted by the Third Circuit, there is ample precedent for its holding that a private insurance policy that is integrated with Social Security benefits is enforceable and does not violate the Social Security Act. *Hurd* v. *Illinois Bell Telephone Co.*, 136 F. Supp. 125, 142 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956), *cert.* denied *sub nom.* Seybold v. Western Electric Co., 352 U.S. 918 (1956); *Voss* v. *Mutual of Omaha Insurance Co.*, 469 S.W.2d 602, 604 (Tex. Ct. Civ. App. 1971); *Killebrew* v. *Abbott Laboratories*, 352 So.2d 332, 336 (La. Ct. App. 1977), *aff'd*, 359 So.2d 1275, 1278 (La. Sup. Ct. 1978); *see Antram* v. *Stuyvesant Life Insurance Co.*, 291 Ala. 716, 287 So.2d 837, 840 (1973); *Dowell* v. *Aetna Life Insurance Co.*, 468 F.2d 802, 805 (4th Cir. 1972), *cert.* denied, 410 U.S. 931 (1973); *Williams* v. *Insurance Company of North America*, 150 Mont. 492, 434

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[7] Petitioner does not challenge the offset of those Social Security benefits to which she was entitled when she first became disabled, and indeed concedes that the offset as to those benefits is valid and does not violate the Social Security Act (Petition at 5a (footnote 5)). Rather petitioner challenges the offsets only as they relate to that portion of the periodic increases in her Social Security benefits (*Id.*).

Petitioner's argument that Section 207 of the Act applies to the periodic increase in benefits, but not to the remaining portion of those benefits, is specious. The anti-assignment statute makes no distinction between the base Social Security payments and any subsequent periodic increases, and the District Court correctly noted that if the statute were applicable to the periodic increases it would of necessity apply to the entire Social Security offset (509 F.Supp. at 568-69; Appendix 29a to Petition). Clearly if, as petitioner concedes, the offset of the base payment is not a transfer, the offset as it applies to that portion that represents the increases cannot be deemed a transfer. *See Buczynski* v. *General Motors Corp.*, 616 F.2d 1238, 1245 (3rd Cir. 1980), *aff'd*, 101 S.Ct. 1895 (1981).

P.2d 395, 397 (1967); *cf. Mays* v. *Insurance Company of North America*, 407 Mich. 165, 284 N.W.2d 256, 259 (1979); *Obiang* v. *Mutual Benefit Life Insurance Co.*, Life, Health and Accident cases, p. 1261 (S.D.N.Y. 1980).

Representative of these cases is *Hurd* v. *Illinois Bell Telephone Co.* In *Hurd*, the plaintiffs were participants in a private pension plan. That plan provided for an "unfrozen" Social Security offset, and each time a participant's Social Security benefits were increased, his benefits under the pension plan decreased. 136 F.Supp. at 132. The plaintiff in *Hurd* contended that this offset was an illegal transfer in violation of the Act's anti-assignment provision. 136 F.Supp. at 141. The court held that the integration of Social Security benefits was not a transfer or assignment of those benefits and did not violate the Social Security Act:

> ". . . the application of the defendant's offset provisions in no way affects their right to [Social Security] benefits. They continue to receive the full government check to which they are entitled under the Act. It is in calculating the service pension that the defendants take into account one-half of the [Social Security] allowance. But Section 207 [42 U.S.C. §407] was never intended to freeze a worker's private pension at a particular level. It was concerned only with guaranteeing that the worker would actually receive for his own use the amount due him under the Social Security Act." 136 F. Supp. at 142.

In this case, as in *Hurd*, petitioner continues to receive her Social Security payments. Accordingly, the offset in question is not a transfer or assignment of those benefits, and does not violate the Social Security Act. *Hurd* v. *Illinois Bell Telephone Co., supra*, 136 F.Supp. at 132; *Voss*

v. *Mutual of Omaha Insurance Co., supra,* 469 S.W.2d at 604; *Killebrew* v. *Abbott Laboratories, supra,* 352 So.2d at 336; *see Antram* v. *Stuyvesant Life Insurance Co., supra,* 287 So.2d at 840; *Dowell* v. *Aetna Life Insurance Co., supra,* 468 F.2d at 805; *Williams* v. *Insurance Company of North America, supra,* 434 P.2d at 397.

Hence, the unfrozen offset in this case simply is not a transfer or an assignment, and the anti-assignment provision of the Social Security Act has no bearing on this private insurance contract. This case merely involves the operation of a lawful provision of a private insurance contract, and does not involve the issue that petitioner presents to this Court.

(b) *The unfrozen offset is consistent with Congressional intent.* Nor does the offset at issue in this case involve any issues of public policy or of Congressional intent. In *Hurd,* the court analyzed the purposes of the Social Security Act, and concluded that an unfrozen offset does not violate the spirit of the Social Security Act:

> "There is no question but that a private pension integrated as the Bell Plan is with [Social Security] benefits absorbs all or part of the increases which Congress votes in the government benefit. Since one purpose of the increases is to compensate for the rising cost of living—that is, to help maintain at an even level the value of the retired worker's income—in a sense the offset device might be thought to violate the spirit of the Social Security laws. There is no evidence, however, that Congress adopted such an attitude toward offset. The [Social Security] benefits are esentially a minimum, an amount that Congress has set to assure that every worker covered by the Act will have a safety-valve against

> destitution in old age. Congress has not legislated on the general subject of retirement income but has merely established an amount that must be available to all who qualify for it." 136 F.Supp. at 148.

Indeed, the *Hurd* court found that the integration of private insurance benefits with Social Security payments served to effectuate Congressional intent:

> "Moreover, the offset practice cannot be said to violate some broader policy of the Social Security Act in its legislative history to show that Congress intended to establish standards of validity or invalidity for private pension plans. What little does appear in the legislative history indicates, contrary to the plaintiffs' position, that some form of integration was a hoped-for aftermath of the federal program. Some members of Congress expressed a fear that the new act might lead to the abandonment of more generous private programs, and they were reassured by Senate leaders of the Social Security legislation that there was nothing in the bill to prevent such companies from considering the federal program as a minimum and continuing to pay their employees an additional retirement income. 79 Con. Rec. 9273, 9529, 9533, 9535 (1935)." 136 F.Supp. at 142 (footnote omitted).

Moreover, when Congress has desired to restrict the use of unfrozen Social Security offsets, it has expressly and unambiguously prohibited their use. 26 U.S.C. §401(a)(15) (1976) (ERISA provision prohibiting use of unfrozen Social Security offsets in approved pension plans); 29 U.S.C. §1056(b) (1976) (Railroad Retirement Act provision prohibiting use of unfrozen Social Security offset).

Indeed, in 1978 Congress considered S.3017, 95th Cong., 2d Sess. §237 (1978), which would have prohibited unfrozen offsets of Social Security benefits in employee welfare plans. The bill would have prohibited the type of offset at issue in this case. Congress did not enact that bill. Congress has never enacted any statute that restricts private disability plans, such as the plan in this case, from utilizing unfrozen Social Security offsets. Thus, there is a clear Congressional intent to allow unfrozen offsets to continue to be used in such contracts.[8]

Accordingly, this case does not involve questions of Congressional intent or public policy. To the extent that Congress has considered the subject, it has not taken any action to prohibit unfrozen offsets in private disability insurance contracts. In light of the legislative history of the anti-assignment statute, and in light of Congress's recent actions with respect to unfrozen offsets in private disability insurance plans, it is evident that this case does not involve important questions of public policy, but is concerned solely with a valid and enforceable contractual provision of a private insurance contract.

(c) *The judgment below is consistent with prior decisions of this Court and the issues raised by petitioner have recently been decided by this Court.* Although petitioner

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[8] Petitioner suggests that Section 224a of the Social Security Act evidences a Congressional intent to prohibit unfrozen offsets in private insurance plans. Petition at 10-11. Petitioner's argument is wholly without merit. Section 224a mandates that a disabled employee's Social Security benefits be partially offset by worker's compensation awards. 42 U.S.C. §424a. It does not speak to the right of private parties to contract for an unfrozen offset. As noted by the Third Circuit, although Congress has considered that issue, it has not amended the Social Security Act to limit the right of private parties to enter into contracts containing unfrozen offsets (643 F.2d 108; Appendix 6a to Petition).

suggests that the judgment below conflicts with *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413 (1973) and with *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), each of those cases is distinguishable from this case. In both *Philpott* and in *Hisquierdo*, this Court analyzed whether Social Security payments could be transferred to a third person by operation of legal process. *Philpott, supra*, 409 U.S. at 415 (local welfare board sued to recover Social Security payments deposited by welfare recipient in bank); *Hisquierdo, supra*, 439 U.S. at 585 (spouse sought order requiring recipient of Railroad Retirement Act payment to turn part of those payments over to her). In this case, however, unlike *Philpott* and *Hisquierdo*, no party has invoked any legal process to reach petitioner's Social Security benefits.[9] Accordingly, the operation of the offset in this case does not violate the Act's anti-assignment prohibition. *Tunnicliff* v. *Commonwealth of Pennsylvania*, 483 Pa. 275, 396 A.2d 1168, 1171 (1979) (anti-assignment statute not violated unless legal process invoked to reach Social Security payments).

Nor does the judgment below conflict with other cases interpreting other Federal anti-assignment statutes. This Court has applied anti-assignment statutes in situations

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[9] Petitioner's suggestion that the Court should grant the Petition to remedy the "patchwork system of distributing federal benefits" once again misconstrues the nature of the offset. The offset only affects the level of payments petitioner receives from respondent and does not affect the level of her Social Security payments. Consequently, petitioner receives the same Social Security benefits as similar Social Security recipients in those States that have prohibited unfrozen offsets. Although a bill has been introduced in Congress that would prohibit unfrozen Social Security offsets in employee welfare plan (see p. 14 *supra*), Congress did not enact that bill. Moreover, Congress has generally indicated its intention to leave the regulation of insurance to the States.

where the recipient has *assigned* or *transferred* his rights to a third person. *Segal* v. *Rochelle*, 382 U.S. 375 (1966); *Martin* v. *Nat'l Surety Co.*, 300 U.S. 588 (1937). However, those decisions do not conflict with the judgment below in this case, where the petitioner has not transferred or assigned any of her Social Security payments.

In addition, the recent opinion of this Court in *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S.Ct. 1895 (1981) militates against the Court's granting the Petition in this case. In *Alessi*, the plaintiffs, who had received Worker's Compensation awards, were participants in two private pension plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). 101 S.Ct. at 1898. The plans contained an offset for the amount of Worker's Compensation benefits received by a participant. 101 S. Ct. at 1898. The plaintiffs contended that the offsets violated the nonforfeiture provision of ERISA. 101 S. Ct. at 1898. That provision provides:

> "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection." 29 U.S.C. §1053(a) (1976).

In *Alessi* this Court examined the legislative history, and found that Congress intended to authorize offsets of Social Security benefits in ERISA approved pension plans. 101 S.Ct. at 1901-02.[10] The Court concluded that

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[10] While authorizing frozen Social Security offsets in ERISA approved pension plans, Congress has expressly prohibited the use of unfrozen Social Security offsets in ERISA plans. 26 U.S.C. §401 (a)(15) (1976). However, although Congress has considered extending this prohibition to private welfare plans, it has not done so. *See* p. 14 *supra*.

the offset of Worker's Compensation benefits, like offsets of Social Security benefits, was not a "forfeiture" under ERISA's non-forfeiture statute:

> "Under these circumstances, we are unpersuaded by retirees' claim that the nonforfeiture provisions by their own force prohibit any offset of pension benefits by workers' compensation awards. Such offsets work much like the integration of pension benefits from Social Security or Railroad Retirement payments. The individual employee remains entitled to the established pension level, but the payments received from the pension fund are reduced by the amount received through worker's compensation. The nonforfeiture provision of §1053(a) has no more applicability to this kind of integration than it does to the analogous reduction permitted for Social Security or Railroad Retirement payments. Indeed, the same congressional purpose-promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations-underlies all such offset possibilities." 101 S.Ct. at 1902-03.

The Court, in reaching this holding, reasoned that the nonforfeiture provisions of ERISA did not guarantee a retiree a particular amount of retirement income, but merely guaranteed the right to participate in the plan. 101 S.Ct. at 1900. The Court also reasoned that Congress prohibited forfeitures and not integration, and that allowing integration with Social Security or Worker's Compensation frequently benefits other participants in the plan:

> "It is particularly pertinent for our purposes that Congress did not prohibit 'integration,' a calcula-

> tion practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all retired employees, even if the nonpension funds are available only to the subgroup of the employees. The pension funds are those integrated with the funds from other income maintenance programs, such as Social Security, and the pension benefit level is determined on the basis of the entire pool of funds. Under this practice, an individual employee's eligibility for Social Security would advantage all participants in his private pension plan, for the addition of his anticipated Social Security payments to the total benefit pool would permit a higher average pension payment for each participant. The employees as a group profit from that higher pension level, although an individual employee may reach that level by a combination of payments from the pension fund and payments from the other income maintenance source. In addition, integration allows the employer to attain the selected pension level by drawing on the other resources, which, like Social Security, also depend on employer contributions." 101 S.Ct. at 1901.

Hence, in *Alessi,* which was decided within the last three months, this Court has addressed the problem of Social Security integration. The reasoning of *Alessi* is applicable in this case. In this case, as in *Alessi,* Congress has not chosen to prohibit the *integration* of Social Security benefits, but rather prohibited the transfer of those benefits. In this case, as in *Alessi,* Congress has not guar-

anteed that private payments to a disabled Social Security recipient would be frozen at a particular level, but has guaranteed that the beneficiary would actually receive her Social Security payments. Hence, in this case, similar to *Alessi*, the Social Security Act leaves the question as to the integration of private insurance contracts with Social Security to the contracting parties.

The judgment below in this case does not conflict with the prior decisions of this Court, and is consistent with the holding and reasoning in *Alessi, supra*. Petitioner has offered no reason for the Court, three months after *Alessi* was decided, to reconsider the issues analyzed and unanimously decided in *Alessi*.

(d) *The contractually agreed upon offset of Social Security benefits paid to petitioner for her dependents does not raise any questions of federal law or of public importance.* The Social Security Act entitles children of disabled persons to monthly Social Security benefits. 42 U.S.C. §402(d)(1). In addition, a representative payee receiving payments for the benefit of a dependent pursuant to this provision has an obligation to use those payments in the dependent's best interest. However, as noted by the Third Circuit below, the contractually agreed upon offset for Social Security benefits for dependents is not an assignment of those benefits and does not raise any issues under the Social Security Act (643 F.2d at 112; Appendix 8a-9a to Petition). Prior decisions have uniformly[11] approved

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[11] Petitioner suggests that *Johnson* v. *Harder*, 383 F.Supp. 174 (D.C. Conn. 1974), *aff'd per curiam*, 512 F.2d 1188 (2d Cir.), *cert.* denied, 423 U.S. 876 (1975) conflicts with the decisions below in this case. However, *Johnson* is readily distinguishable from the case at hand.

(Footnote continued on following page)

this and other similar offsets. *Dowell* v. *Aetna Life Insurance Co.*, 468 F.2d 802, 805 (4th Cir. 1972), *cert.* denied, 410 U.S. 931 (1973); *Garvey* v. *Worcester Housing Authority*, 629 F.2d 691 (1st Cir. 1980), *cert.* denied *sub nom.* La Rosa v. Worcester Housing Authority, 101 S. Ct. 1379 (1981).

The offset of Social Security payments petitioner recieves on behalf of her dependents raises no issues under the Social Security Act, and does not justify the granting of the petition.

(Footnote continued from preceding page)

Johnson involved a conflict between the Social Security Act and a state's Aid to Dependent Children program. A state regulation provided for the offset of federal benefits paid to a parent for the use of a dependent in calculating the amount due under the state program. If the amount of the federal benefit for a dependent exceeded the state benefit for the dependent, the state regulation required the surplus to be used to reduce the state benefits allocated for other dependents. The court did not invalidate the offset. However, it held as invalid under the Supremacy Clause the regulation insofar as it required the surplus to be used to reduce the state benefits allocated to other dependents. In the present case, there is no "surplus" offset to reduce benefits due to others. Since the offset in *Johnson* was upheld except to the extent of the surplus, *Johnson* does not conflict with this case.

Moreover, the court noted in *Johnson* that the plaintiff was destitute, and made a factual conclusion that plaintiff, without the state welfare payments she would lose by operation of the offset, would have to use the Social Security payments made to her on behalf of her dependents "to meet her own bare subsistence and thus [deprive] her children of the benefits which the payments are designed to afford." 383 F. Supp. at 180. In this case, however, unlike in *Johnson*, there is no evidence that the plaintiff is using the benefits in question for her own use. Indeed, if she were to use those benefits for her own use, she would be exposed to potential criminal liability. 42 U.S.C. §408(e).

CONCLUSION

For all of the foregoing reasons the petition should be denied.

Respectfully submitted,

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